Supreme Court, U.S.
FILED

981011 DEC 21 1998

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No. 98-___

In The

Supreme Court of the United States

October Term, 1998

DANIEL MAGAÑA-PIZANO,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent, a legal permanent resident for more than twenty years who is deportable based on a single misdemeanor drug offense, is being held in executive custody and has been ordered deported based on the Attorney General's retroactive application of a 1996 amendment to the Immigration and Nationality Act (INA). After exhausting administrative remedies, respondent filed both a habeas corpus action in district court and, alternatively, a petition for review directly in the court of appeals to challenge his final deportation order on constitutional and non-constitutional grounds. The court of appeals, finding that both its own and the district court's jurisdiction was repealed by new INA amendments, held that preclusion of all review violated the Constitution and that the district court retained jurisdiction under 28 U.S.C. 2241 over both claims. The question presented is:

1. Whether the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) repealed the jurisdiction of both the courts of appeals and the district courts over challenges to a deportation order raising claims of statutory construction and constitutional violation and, if so, whether AEDPA and IIRIRA violate the Suspension of Habeas Corpus Clause, Article III or the Due Process Clause of the Constitution.

OPINIONS BELOW

Daniel Magaña-Pizano, respondent in *INS v. Magaña-Pizano*, No. 98-836, refers the Court to the Opinions Below section in Respondent's Brief in Opposition in No. 98-836, filed simultaneously with this cross-petition on December 21, 1998, and to the government's Petition for Certiorari, which was docketed on November 19, 1998.

JURISDICTION

Cross-petitioner refers the Court to the Jurisdiction section in Respondent's Brief in Opposition to Certiorari in No. 98-836, filed simultaneously with this cross-petition on December 21, 1998, and to the government's Petition for Certiorari, which was docketed on November 19, 1998.

STATUTES OR OTHER PROVISIONS INVOLVED

Cross-petitioner refers the Court to the Statutes or Other Provisions Involved section in the Petition for Certiorari and Respondent's Brief in Opposition in No. 98-836.

STATEMENT

Daniel Magaña-Pizano conditionally cross-petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit that the court of appeals lacked jurisdiction over his petition

for review. Cross-petitioner requests that this conditional cross-petition be granted if the Court grants the petition filed by the Solicitor General in *INS v. Magaña-Pizano*, No. 98-836. Cross-petitioner, however, opposes the grant of that petition. *See* Respondent's Brief in Opposition, *INS v. Magaña-Pizano*, No. 98-836 (filed Dec. 21, 1998).

The Board of Immigration Appeals (BIA) issued cross-petitioner a final order of deportation on March 14, 1998. Pet. App. 53a. The BIA based its order on *Matter of Soriano* (Pet. App. 99a), in which the Attorney General held that Section 440(d) of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, 1277, applied retroactively to deprive legal permanent residents like cross-petitioner of statutory eligibility to apply for relief from deportation under Section 1182(c) of the Immigration and Nationality Act (INA).

Cross-petitioner challenged the BIA's final order of deportation by filing a habeas corpus petition in district court and, when the district court dismissed his habeas petition for lack of jurisdiction, by appealing the dismissal and by filing a timely petition for review directly in the court of appeals pursuant to 8 U.S.C. 1105a, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-549. The court of appeals consolidated the habeas appeal and the petition for review. In the consolidated appeal, cross-petitioner challenged the BIA's final order of deportation on the grounds that, *inter alia*, (1) the Attorney General erred as a matter of law when she held in *Matter of Soriano* that AEDPA Section 440(d) applied retroactively to convictions occurring before AEDPA's enactment, and (2) irrespective of

whether Section 440(d) applies retroactively, it violates equal protection by depriving deportable but not excludable legal resident immigrants of eligibility for discretionary relief.

In regard to jurisdiction, cross-petitioner sought judicial review of both his constitutional and statutory claims either in a habeas corpus action in district court or by a petition for review in the court of appeals. The court of appeals dismissed the petition for review and held that cross-petitioner was entitled to raise both his claims in a district court habeas corpus action. Pet. App. 24a. The court remanded the habeas petition to the district court for a ruling on the merits without expressing a view on either the retroactivity or the equal protection claim. *Id.* The government then filed a petition for *certiorari* to this Court. The government now concedes that the court of appeals had jurisdiction on direct review over cross-petitioner's constitutional equal protection claim. Pet. Br. 19 ("The court of appeals . . . erred in construing Section 309(c)(4)(G) as precluding review of respondent's constitutional challenge"). It further asserts that jurisdiction over any other claim that is reviewable must lie exclusively in the court of appeals, but contends that no court has jurisdiction to hear cross-petitioner's particular retroactivity claim. Pet. Br. 20-21, 23. Finally, the government argues that if cross-petitioner's statutory claim is reviewable, review should occur "in the court of appeals on petition for review. . . . [because] [s]uch a construction of Section 309(c)(4)(G) would be far more harmonious with

Congress's general design in IIRIRA than is the result reached by the courts of appeals." Pet. Br. 24-25.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

In the event the Court grants the government's *certiorari* petition in *Magaña-Pizano,* this conditional cross-petition should be granted as well. Cross-petitioner filed both a habeas corpus action and a petition for review. If the Court grants the government's petition to consider the jurisdiction of the federal courts to review cross-petitioner's claims, cross-petitioner would pursue – as he did in the court of appeals – his claim to judicial review pursuant to the jurisdiction of either the district court or the court of appeals. Insofar as necessary, cross-petitioner would seek to modify the court of appeals' holding that it lacked jurisdiction over his petition for review. Accordingly, respondent files the instant conditional cross-petition. Cross-petitioner's conditional cross-petition is filed as a protective matter to ensure that the Court perceives no impediment to considering the jurisdictional questions regarding the jurisdiction of *both* the courts of appeals *and* the district courts in this case. *See* Pet. Br. 27-29.[1] This case (unlike *Reno v. Goncalves,* No. 98-835), along with the instant conditional cross-petition, presents

[1] Cross-petitioner believes that the government's petition for *certiorari* in *INS v. Magaña-Pizano,* No. 98-836, presents the jurisdiction of both the district court and the court of appeals, but he files this petition as a protective matter.

the Court with a complete procedural vehicle for addressing the federal courts' jurisdiction to review statutory and constitutional challenges to a final deportation order.

CONCLUSION

For the reasons stated, in the event the petition for *certiorari* filed in No. 98-836 is granted, this conditional cross-petition should be granted as well.

Respectfully submitted,

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